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Paper No. 28
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Microvision, Inc.

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Serial No. 75/162,011

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Kent A. Fischmann of Holme Roberts & Owen LLP for Microvision, Inc.

Wendy B. Goodman, Trademark Examining Attorney, Law Office 103 (Daniel P. Vavonese, Acting Managing Attorney).

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Before Quinn, Bottorff and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On September 6, 1996, Microvision, Inc. (applicant) filed a trademark application to register the mark VIRTUAL RETINAL DISPLAY (typed drawing) for goods ultimately identified as "electro-optic image projection devices, namely devices for projecting an image directly onto the eye" in International Class 9.[1]

[1] Serial No. 75/162,011. Applicant requests registration under Section 1(b) of the Trademark Act, alleging a bona fide intent to use the mark in commerce.

The Examining Attorney refused to register the mark on the ground that the mark, when applied to the goods, is merely descriptive. 15 U.S.C. § 1052(e)(1).

The Examining Attorney's position is that the mark VIRTUAL RETINAL DISPLAY is merely descriptive for applicant's goods, which are "used to project images onto the *retina*. The *retina* is transformed into a *virtual display* from which the person can view these images." Examining Attorney's Brief, p. 3 (emphasis in original).

The Examining Attorney cites numerous LEXIS/NEXIS articles to demonstrate the descriptiveness of the term VIRTUAL RETINAL DISPLAY. Some of these excerpts are set out below:

> [A] helmet-mounted virtual retinal display system would allow pilots to keep their eyes on their flying while getting information that normally would be on cockpit dials and gauges (*Seattle Post-Intelligencer*, May 31, 1999).
>
> He showed the educators the cutting-edge technology, including a virtual retinal display that would fit like a contact lens. It would allow a person to have 20-20 vision and surf the Web, watch TV or compute at the same time (*The Daily Oklahoman*, February 26, 1999).
>
> This virtual retinal display utilizes photon generation and manipulation to create a panoramic, high resolution, color virtual image that is projected directly onto the retina of the eye without creating a real or an aerial image that is viewed via a mirror or optics (*Display Development News*, November 1997).

The Examining Attorney also relied on numerous dictionary definitions to support the refusal to register the mark.[2]

These definitions include[3]:

> Virtual – (1) Simulated; especially simulated by electronic technology (*High–Tech Dictionary*); (2) An adjective that expresses a condition without boundaries or constraints. It is often used to define a feature or state that is simulated in some fashion. However, it has become such a fashionable computer word that it may be a prefix to "virtually" any electronic concept or product without regard to the original meaning of the term (*Tech Encyclopedia*); (3) being such in essence or effect though not formally recognized or admitted; of, relating to, or being a hypothetical particle whose existence is inferred from indirect evidence (*Merriam-Webster's Collegiate Dictionary, 10th Edition* (1993)).

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[2] The Examining Attorney requests that we take judicial notice of more than ten definitions for the following words, which were submitted for the first time with the Examining Attorney's appeal brief: retina, retinal, virtual display, virtual, virtual image, and display. Some words have more than one definition. We, of course, can take notice of dictionary definitions. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). While we normally take judicial notice of dictionary definitions submitted in applicants' and examining attorneys' appeal briefs, we are less comfortable in this case where we are asked to take judicial notice of more than ten definitions. Obviously, this is not the ideal way to prosecute a trademark application. However, we do take judicial notice in this case because the definitions do not substantially change the underlying basis of the Examining Attorney's refusal. In addition, applicant has not objected. While applicant requested an extension of time to file a reply brief, no reply brief was ever filed.

[3] The Examining Attorney also attached excerpts from *The Computer Dictionary* but no specific reference was made to those definitions.

Virtual Image – (1) an image (as seen in a plane mirror) formed of points from which divergent rays (as of light) seem to emanate without actually doing so. (*Merriam-Webster's Collegiate Dictionary, 10th Edition*(1993)); (2) in graphics, the complete graphic image stored in memory, not just the part of it that is displayed at the current time (*Tech Encyclopedia*).

Virtual Display – a display technology that creates a full screen image in a small space (*Tech Encyclopedia*).

Display – (1) an electronic device (as a cathode ray tube) that temporarily presents information in visual form (*Merriam-Webster's Collegiate Dictionary, 10th Edition* (1993)); (2) to present or hold up to view (*The American Heritage Dictionary of the English Language, 3rd Edition* (1992)); (3) to put or spread before the view (*Merriam-Webster's Collegiate Dictionary, 10th Edition* (1993)).

Retinal – of, relating to, involving a retina (*Merriam-Webster's Collegiate Dictionary, 10th Edition* (1993)).

Retina – The sensory membrane that lines the eye is comprised of several layers, including one containing the rods and cones, and functions as the immediate instrument of vision by receiving the image formed by the lens and converting it into chemical and nervous signals which reach the brain by way of the optic nerve (*Merriam-Webster's Collegiate Dictionary, 10th Edition* (1993)).

Previously, the Examining Attorney submitted excerpts from eleven patents and printouts from the Internet, which showed the use of the term "virtual retinal display" and related terms in United States patents and other documents. Based on this evidence, the Examining Attorney concluded that the term VIRTUAL RETINAL DISPLAY is merely descriptive in relation to applicant's goods.

Applicant, on the other hand, maintains that its term is suggestive and not merely descriptive. Applicant argues that its "goods are not 'Virtual Displays' they are actual physical objects and the term virtual is no more descriptive of Applicant's goods than of any other physical object." Applicant's Appeal Brief, p. 3. In addition, it claims that its "goods scan a beam of light into user's eye so that the user perceives an image without the need for a display screen. That image need not, and almost never is, a display of a retina. Thus, the device is not a 'Retinal Display.'" Applicant's Appeal Brief, p. 2. Further, applicant notes that eight of the eleven cited patents are either assigned to the University of Washington or refer to the assigned patents. Applicant identifies the University of Washington as "a development partner of Applicant and Applicant has been engaged in discussions with the University regarding the mark." Id. at 7. In addition to these points, applicant also maintains that the term is incongruous and not used by competitors. Therefore, it concludes the term is not descriptive.

After the Examining Attorney's final refusal, this appeal followed. Applicant and the Examining Attorney[4] have

[4] The current Examining Attorney was not the original Examining Attorney.

filed briefs. An oral hearing was not requested. We affirm the Examining Attorney's refusal to register applicant's mark.

We begin our analysis by noting that a mark is merely descriptive if it immediately describes the ingredients, qualities, or characteristics of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978). A term may be descriptive even if it only describes one of the qualities or properties of the goods or services. In re Gyulay, 820 F.2d 1216, 1217, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). We look at the mark in relation to the goods or services, and not in the abstract, when we consider whether the mark is descriptive. Abcor, 588 F.2d at 814, 200 USPQ at 218.

We agree with the Examining Attorney's position that "applicant's goods are used to project images onto the retina. The retina is transformed into a virtual display from which the person can view these images." Examining Attorney's Appeal Brief, p. 3 (emphasis omitted). While applicant argues that its goods are not a virtual display, the patents that applicant claims to have the "exclusive right to market" (Request for Reconsideration, p. 4)

clearly describe the resulting image as a "virtual image." See, e.g., "Further, the photon generator may utilize color light generators so as to scan a colored virtual image directly onto the retina of the user's eye" (Pat. No. 5,467,104, abstract) and "A virtual image display utilizes photon generation and manipulation to create a panoramic, high resolution, color virtual image that is projected onto the retina of the eye." (Patent No. 5,596,339, abstract). See also Id. (Description of the Preferred Embodiment) ("Because the virtual retinal display does not use a real image display"). In addition, the evidence that applicant submitted with its "Submission of Additional Evidence Pursuant to Grant of Request for Remand" includes a paper entitled "MICRODISPLAYS – What are microdisplays?" that explains how the term "virtual" is used to describe microdisplays.

> These tiny displays called miniature flat panels, are the engines which create the images in two broad classes of devices. They are projection-based systems and virtual display-based systems.
>
> Optics magnify and produce a real image that is projected and imaged upon a screen. Front projection configurations utilize a distant wall or screen to view the magnified image. Rear projection configurations enclose the magnification optics in back of an imaging screen to produce a self-contained system. . . .
>
> Virtual Microdisplays

> Optics magnify the display image but create a virtual (as opposed to real) image that appears recessed inside a viewfinder. A user looks into a small viewfinder but sees an image that appears much larger and floating some distance from the viewer.

The Examining Attorney's definitions of "virtual" as "simulated" (*High-Tech Dictionary*) and "virtual display" as "display technology that creates a full screen image in a small space" (*Tech Encyclopedia)* support the descriptiveness of the terms. In addition, the patentees used the terms "virtual" and "display" descriptively. Pat. No. 5,467,104 Summary of the Invention ("In accordance with the present invention, the disadvantages of prior virtual image display systems have been overcome"). See also *The Commercial Appeal*, November 16, 1996, p. 4B ("But rather than seeing something real, with Microvision the user sees an image created by a computer").

Thus, the terms "virtual" and "display" describe features of applicant's goods since they create an image or display that is small but it appears much larger as the image in the viewfinder. Accord In re Styleclick.com Inc., 58 USPQ2d 1523, 1526 (TTAB 2001) ("[P]eople have come to recognize that the term 'virtual,' when used in connection with computers and related goods and services, means that someone at a computer is able to encounter things in a non-physical or 'virtual' manner").

Applicant's argument that the word "retinal" is not descriptive of its goods because the goods do not normally display an image of a retina does not mean the term is not descriptive for goods that display an image on the retina. Applicant itself acknowledges that its competitors' patents use the terms "retinal" and "retina" to describe a system that displays an image on the retina. "Rather, the Motorola patent (No. 5.369,415) describes its product as a 'direct retinal scan display.' Similarly, Sony describes its device as a 'retina direct display apparatus' (U.S. Patent No. 5.371,556)." Request for Reconsideration, p. 7. This is also consistent with the Examining Attorney's definition of "retinal" as "of, relating to, involving, or being a retina." *Merriam-Webster's Collegiate Dictionary, 10th Edition*.

While we have examined the terms "virtual," "retinal" and "display" and have found that they describe the goods, that is not the test in determining whether applicant's mark is merely descriptive. Applicant is correct when it maintains that we must consider the mark as a whole. Indeed, applicant argues that "the terms 'retinal' and 'display' are incongruous because display denotes a presentation in 'open view' whereas the retina is concealed within the eye." Applicant's Brief, p. 4.

We find nothing incongruous about the term "virtual retinal display" for electro-optic image projection devices, namely devices for projecting an image directly onto the eye. There are two types of display systems, virtual and projection. A virtual display is display technology that creates a full screen image in a small space. "Retinal" merely describes where the image is displayed. The evidence from the patents and LEXIS/NEXIS evidence supports the Examining Attorney's determination that the term as a whole is merely descriptive. While applicant points out that many, if not most, of these references are to a partner of applicant or to applicant itself, this does not preclude their use in determining whether the term is merely descriptive. See Gyulay, 3 USPQ2d at 1010 ("Appellant argues that it is 'unfair to use appellant's wholesale catalog to determine whether or not the trademark APPLE PIE is descriptive. We discern no error or inequity in the Board's use of appellant's catalog as evidence of what it contains"). Here, there is also nothing "unfair" about referring to patents owned by a partner of applicant to see how the term was used in the patent document. These underlying patents use the term descriptively when referring to the invention. Pat. No. 5,596,339, Field of Invention ("The present invention is

directed to a virtual image display system and more particularly to a virtual retinal display"); id., Description of Preferred Embodiments ("In order to provide a stereoscopic system a second virtual retinal display may be utilized in parallel to the first retinal display").

The LEXIS/NEXIS printouts that the Examining Attorney made of record, even if they refer to applicant or its partner, show that the term is used descriptively. See, e.g., *The Seattle Times*, March 27, 1998, p. D4 ("The Seattle maker of virtual retinal displays"); *Display Development News*, November 1997 ("The Board of Trustees of the University of Washington received US Patent 5,659,327 for a virtual retinal display in August, 1997. This new technology has been receiving considerable attention"); *Electronic Engineering Times*, June 6, 1997, p. 35 (Microvision and Saab "are joining forces to explore the commercial possibilities for advanced visual displays based on virtual retinal-display (VRD) technology"); *The Commercial Appeal*, November 19, 1996, p. 4B ("Virtual retinal display doesn't have that problem. It projects light directly into the eye"). Thus, the printouts show that the term "virtual retinal display" is used to describe the new technology developed by the University of Washington.

Applicant also argues that the term is not descriptive because its competitors do not need to use the term. This is not the test. Merely because the references are to applicant does not mean that the term is not descriptive. In re Helena Rubinstein, Inc., 410 F.2d 438, 441, 161 USPQ 606, 609 (CCPA 1969) ("Applicant's long use of the wording, and the fact that others have not used it up to this time, does not make it any less an apt description for the goods"). This is particularly true here where the technology is a new refinement of the technology of which applicant is apparently the exclusive licensee under the patents.

Because we conclude that the term VIRTUAL RETINAL DISPLAY describes a feature of the goods when the term is considered as a whole, the mark is merely descriptive.

Decision: The Examining Attorney's refusal to register the mark VIRTUAL RETINAL DISPLAY on the ground that the mark is merely descriptive of the involved goods is affirmed.